Supreme Court, U. S.
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No.

In the Supreme Court of the United States

OCTOBER TERM, 1976

77-296

DUANE OWEN HESTNES,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on June 27, 1977.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit has not been reported. The opinion is set out in full in the Appendix beginning at 1a, *infra*.

All of the issues raised by petitioner in the instant petition were raised before the District Court in post-verdict

motions. The issues contained in Questions 2 and 3, *infra*, were discussed by the District Court in a Memorandum dated November 5, 1976, and an Opinion and Order dated January 11, 1977. Neither of these has been published. The Memorandum and Opinion and Order are set out in full in the Appendix beginning at 9a, *infra*, and 13a, *infra*, respectively.

The issue contained in question 1, *infra*, was not discussed by the District Court in its written decisions on the petitioner's post-verdict motions. In an Order dated December 8, 1976, the District Court rejected petitioner's argument concerning the issue contained in Question 1, *infra*, with the statement, "The trial record adequately reflects my reasons for ruling as I did." The only portion of the trial record which reflects the District Court's reasoning with respect to this issue is the Court's response to the petitioner's offer of proof as to the nature of the testimony expected from petitioner's second expert witness. The petitioner's offer of proof and the District Court's response are set out in full in the Appendix at 18a, *infra*.

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on June 27, 1977. Petitioner duly filed a motion for reconsideration. Petitioner's motion for reconsideration was denied by an order entered on July 22, 1977. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether, in a case where the Government and the defendant had each offered the opinion of an expert witness as to a critical issue, the trial court has "discretion" under Rule 403 of the Federal Rules of Evidence to refuse

to permit the defendant to call a second expert to testify if his opinion is consistent with the defendant's first expert without violating the defendant's right to compulsory process guaranteed by the Sixth Amendment to the Constitution of the United States.

2. Whether a jury instruction which equates reasonable doubt with substantial doubt is improper and prejudicial in a case where there is a substantial factual dispute for resolution by the jury.

3. Whether Rule 16 of the Federal Rules of Criminal Procedure requires the pretrial disclosure by the Government of the results of tests and experiments introduced in its case-in-chief which were not recorded in a report but merely retained in the memory of the Government's witness.

CONSTITUTIONAL PROVISIONS, RULES AND REGULATIONS INVOLVED

The Sixth Amendment to the Constitution of the United States:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

21 C.F.R. §1308.12(a)(4):

> "(a) The Schedule II shall consist of the drugs and other substances, by whatever official name, common or usual name, chemical name, or brand name designated, listed in this section Each drug or sub-

stance has been assigned the Controlled Substances Code Number set forth opposite it.

"(4) Coca leaves (9040) and any salt, compound, derivative, or preparation of coca leaves, and any salt, compound, derivative, or preparation thereof which is chemically equivalent or identical with any of the substances, except that the substances shall not include decocanized coca leaves or extraction of coca leaves, which extractions do not contain cocaine (9041) or ecgonine (9180)."

Rule 16(a)(1)(d), Federal Rules of Criminal Procedure:

"(D) Reports of Examinations and Tests. Upon request of a defendant the government shall permit the defendant to inspect and copy or photograph any results or reports of physical or mental examinations, and of scientific tests or experiments, or copies thereof, which are within the possession, custody, or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government, and which are material to the preparation of the defense or are intended for use by the government as evidence in chief at the trial."

Rule 403, Federal Rules of Evidence:

"Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

STATEMENT OF THE CASE

Petitioner was charged by indictment with three counts of delivery of a controlled substance in violation of 21 U.S.C. §841. The indictment charged that petitioner distributed 28.15 grams of cocaine on December 16, 1975, 28.05 grams of cocaine on December 18, 1975, and 56.37 grams on January 13, 1976. Each count charged that cocaine was a "Schedule II narcotic drug controlled substance." The jury returned guilty verdicts on all three counts and, on January 14, 1977, petitioner was sentenced to concurrent terms of five years imprisonment followed by a three year special parole term on each count.

Petitioner's defense focused on a single issue, the sufficiency of the government's proof that the substance involved in each count was a controlled substance. In part, it was petitioner's theory of defense that the government had failed to prove that the substances involved in the three transactions were the one form of cocaine which is a controlled substance rather than one of the other isomeric forms of cocaine which are not controlled substances.

The testimony of the expert witness called by the government, Thomas Janovsky, and the expert witness who testified for the defendant, Dr. Robert Shapiro, was in agreement about a number of things. They both testified that, in theory, cocaine occurred in 16 diastereoisomeric forms; that eight of these diastereoisomers are discussed in the chemical literature; the eight make up four pairs of enantiomers and are called *l*-cocaine, *d*-cocaine; *l*-pseudo-cocaine, *d*-pseudo-cocaine; *l*-allo-cocaine, *d*-allo-cocaine; *l*-allo-pseudo-cocaine, and *d*-allo-pseudo-cocaine; of these eight forms of cocaine, only one, *l*-cocaine, occurs naturally in the coca plant; the other seven are not chemically identical or equivalent to *l*-cocaine. Since only derivatives of coca leaves and compounds which are chemically equivalent or identical to such derivatives are controlled by Schedule II, the trial court instructed the jury that the government had the burden of proving beyond a reasonable doubt that the substance involved in each count was *l*-cocaine.

There are a number of methods for distinguishing between the controlled substance *l*-cocaine and the uncontrolled substance *d*-cocaine. One method is to use a device called a polarimeter. This device measures the direction and degree that a substance will bend a plane of polarized light. *l*-Cocaine will bend a plane of polarized light a certain number of degrees to the left. *d*-Cocaine will bend a plane of polarized light the same manner of degrees to the right. The government ran polarimetry tests on the three substances, but it did not run these tests until after the jury had been selected and did not provide the results to petitioner until the eve of the trial testimony. The trial court ruled that the government would not be permitted to introduce the results of these tests because of its failure to comply with Rule 16 of the Federal Rules of Criminal Procedure. What is important about this test for purposes of this petition is that the polarimetry test does not require a comparison with a known sample of *l*-cocaine.

The government's proof that the substances were *l*-cocaine rather than *d*-cocaine was based on another test, a mixed melting point test. This test requires that the examiner began with a quantity of known *l*-cocaine. The melting point of *l*-cocaine and *d*-cocaine are the same. A mixture of *l*-cocaine and *d*-cocaine will have a different melting point. In theory, if a quantity of known *l*-cocaine is mixed with a portion of the unknown substance and the melting point does not change, then the unknown substance is *l*-cocaine and not *d*-cocaine.

Two problems arose with respect to the government's proof concerning the mixed melting point test. First, the government's expert used as his known substance a substance purchased from a chemical company. The label put on the bottle by the chemical company identified the

substance simply as cocaine without specifying whether it was *d*-cocaine or *l*-cocaine. In order to prove the substance in the bottle was *l-cocaine,* the government's chemist testified about a polarimetry test he had run on the substance in the bottle. He testified that he did not record the results of this test but simply retained the results in his memory. The results of this testing were not disclosed to the petitioner prior to trial. The trial court refused to exclude testimony about this polarimetry testing on the substance in the bottle on the grounds that Rule 16 of the Federal Rules of Criminal Procedure required disclosure only of tests recorded in documentary form. The second problem arose because the government's chemist chose to perform the mixed melting point test on the gold chloride sale of cocaine rather than on the free base. Petitioner's expert, Dr. Shapiro, testified that the mixture of the d- and *l*- isomeric forms of some salts of cocaine would lower the melting point, the *d*- and *l*- mixture of other salts would raise the melting point and the *d*- and *l*- mixture of yet other salts would have no effect on the melting point. It is not possible to predict which salts will have no effect on the melting point. Since there are no literature values for the melting point of *d*-cocaine gold chloride and *l*-cocaine gold chloride, the gold chloride salt was not a suitable medium for a mixed melting point test in Dr. Shapiro's opinion. The lack of change in the melting point could mean either that the unknown substance was *l*-cocaine gold chloride or it could mean that the mixture of the *l*- and *d*- isomeric forms of cocaine gold chloride had no effect on the melting point. The government's expert agreed that there were not literature values for the melting point of a mixture of *d*- and *l*-cocaine gold chloride but that it was his opinion that such a mixture would lower the melting point.

It was this question of the suitability of the gold chloride salt as a medium for a mixed melting point test that led petitioner to attempt to offer the testimony of a second expert witness. Petitioner's counsel misjudged the length of time it would take for the other testimony and the second expert was not in the courtroom when the balance of petitioner's case was completed. He was expected to arrive within a few minutes. Petitioner requested a brief recess to permit him to present the testimony of the second expert. The trial court refused. Petitioner made an offer of proof as to the testimony he wished to offer. The trial court again refused to wait the few minutes necessary for the witness to arrive. The Court of Appeals treated this refusal to grant a brief recess as an exercise of discretion under Rule 403, Federal Rules of Evidence, to exclude the witness' testimony because it would be cumulative.

In instructing the jury, the trial court gave the definition of reasonable doubt contained in LaBuy, *Jury Instructions in Federal Criminal Cases,* §6.01-3. That instruction provides that a reasonable doubt "must be substantial rather than speculative." The instruction was given over a specific objection that it was improper to equate reasonable doubt with substantial doubt.

REASONS FOR GRANTING THE WRIT

I. The Ruling Of The Court Below That Rule 403 Of The Federal Rules Of Evidence Gives A Trial Court Discretion To Exclude The Testimony Of A Second Expert Witness About A Critical Issue On The Ground That It Is Cumulative Is In Conflict With Decisions Of This Court And Other Courts Of Appeals Relating To A Criminal Defendant's Right To Compulsory Process Guaranteed By The Sixth Amendment To The Constitution Of The United States.

The decision of the court below stands for the following proposition: if, in a criminal case, on a critical issue, the government offers the opinion of an expert witness that proposition A is true and the defendant offers the opinion of an expert witness that proposition A is not true, the trial court is given discretion by Rule 403 of the Federal Rules of Evidence to exclude testimony offered by the defendant from a second expert that proposition A is not true in the interest of saving time. This is a rather frightening concept.

There are few rights guaranteed to a defendant in a criminal case which are more important than his right to offer testimony of witnesses in support of his theory of defense.

> "The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose

> of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law." *Washington* v. *Texas*, 388 U.S. 14, 19 (1967).

The court below ruled that because both of the defendant's experts would testify that proposition A was not true, the jury need hear only one of them. What the court below has done has balanced the defendant's right to present to the jury as much evidence as he can in support of his theory of defense against the interests of the trial court in saving time, and the defendant comes out the loser. The balancing is done without even a hint of recognition that the defendant's interest carries the weight of the Sixth Amendment guarantee of compulsory process.

Under the interpretation of the court below of the powers bestowed on trial judges by Rule 403, a trial court could exclude the testimony of a witness whose only function would be to corroborate the defendant's testimony. But this Court has been more solicitous of the right of a defendant in a criminal case to present testimony in support of his defense in situations where the competing interest is even greater than simply some time saved. In *Washington* v. *Texas*, the defendant sought to offer the testimony of a co-defendant to verify his testimony that he did not fire the fatal shot and, in fact, tried to prevent the shooting. The testimony was excluded under a rule disqualifying accomplices as witnesses for defendants. This Court held that such a rule deprived the defendant of his rights under the Sixth Amendment. See also *Chambers* v. *Mississippi*, 410 U.S. 284 (1973); *Cool* v. *United States*, 409 U.S. 100 (1972).

Courts of Appeals have similarly held that the exclusion of testimony of witnesses who are called to corroborate the testimony of a defendant violates the Sixth Amendment. In *Braswell* v. *Wainwright*, 463 F.2d 1148 (5th Cir. 1972), the Fifth Circuit ruled that exclusion of testimony of a corroborating witness in a state prosecution because he violated a sequestration order deprived the defendant of his right to compulsory process. In *United States* v. *White*, 324 F.2d 814 (2d Cir. 1963), the Second Circuit held it was an abuse of discretion to refuse to continue a case mid-trial for a period of two weeks to permit the defendant to call a government informant in an effort to obtain testimony corroborating the defendant's testimony. See also *United States* v. *Melchor Moreno*, 536 F.2d 1042 (5th Cir. 1976); *Paoni* v. *United States*, 281 F. 801 (3rd Cir. 1922).

As this case was presented to the jury, they were left with directly contrary opinions of two expert witnesses on a critical issue. If the jury believed the opinion of the government's expert that the gold chloride salt was a suitable medium for performing a mixed melting point test, they could find that the government's proof that the substance was *l*-cocaine was adequate. If, on the other hand, they believed the opinion of the defendant's expert that the gold chloride salt was not a suitable medium and that the results of a mixed melting point test using this salt were meaningless, the government's proof of the identity of the substance as *l*-cocaine was insufficient. It is clear from the verdict that the jury chose to believe the government's expert. If the defendant had been permitted to offer the testimony of his second expert, an employee of the State Crime Laboratory, it would have become clear that the "opinion" of the government's expert was not based on generally accepted scientific principles.

In order to prevent Rule 403 of the Federal Rules of Evidence from becoming a vehicle for swallowing up a criminal defendant's right to call witnesses in the interest of judicial timesaving, this Court should issue its writ.

II. The Decision Of The Court Below That A Jury Instruction Equating Reasonable Doubt With Substantial Doubt Is Not Prejudicial Is In Conflict With The Holding Of The Court Of Appeals For The Fifth Circuit.

The courts of appeals for two circuits other than the court below have held that a jury instruction which equates reasonable doubt with substantial doubt is improper. In *United States* v. *Atkins,* 487 F.2d 257 (8th Cir. 1973), the court concluded that the terms reasonable doubt and substantial doubt were not equivalent. Proof beyond a reasonable doubt requires a greater showing. But, in that case, the defendant made no objection to the instruction and the court held that it was not plain error to give the instruction. In *United States* v. *Alvero,* 470 F.2d 981 (5th Cir. 1972), the court held that an instruction equating reasonable doubt with substantial doubt was improper. Both the defendant and the government had objected to the instruction. After reviewing the instruction in the context of the total charge, the court concluded that no other portion of the charge modified this improper definition of the burden on the government and reversed the conviction.

The United States Court of Appeals for the Seventh Circuit has considered instructions which equate reasonable doubt with substantial doubt in a number of cases. The resolution of this problem in the Seventh Circuit has been anything but uniform. In *United States* v. *Bridges,* 499 F.2d 179 (7th Cir. 1974), the court concluded that an

instruction equating reasonable doubt with substantial doubt was objectionable and directed the trial court not to give it on the retrial ordered. In *United States* v. *Lawson,* 507 F.2d 433 (7th Cir. 1974) and *United States* v. *Shaffner,* 524 F.2d 1021 (7th Cir. 1975), the court, in dicta, expressed its approval for the language of an instruction equating reasonable doubt with substantial doubt. In *United States* v. *Gratton,* 525 F.2d 1161 (7th Cir. 1975), the court recognized the conflict between the decisions in *Bridges* and *Lawson* but did not attempt to resolve the conflict. Because the defendant had made no objection to the instruction, the court merely concluded that giving the instruction was not plain error relying on the Eighth Circuit decision in *United States* v. *Atkins, supra.* In *United States* v. *Crouch,* 528 F.2d 625 (7th Cir. 1976), the court interpreted the decision in *Gratton* as a reaffirmation of the position it originally took in *Bridges.* In *United States* v. *Wright,* 542 F.2d 975 (7th Cir. 1976), the court once again ruled that an instruction equating reasonable doubt with substantial doubt would not constitute plain error where there was no objection to the instruction but indicated that, in the future, cases where the instruction was given would be reversed as a matter of the appellate court's supervisory power. In the instant case, the court below held that an instruction equating reasonable doubt with substantial doubt was not prejudicial and that its prior decision stood only for the proposition that, in the exercise of its supervisory power, it would not permit district courts to continue to give such an instruction. This decision brings the court below in direct conflict with the Court of Appeals for the Fifth Circuit. It also brings the court below to an untenable position. If an instruction equating reasonable doubt with substantial doubt is invariably not prejudicial to a defendant, then there is no purpose for employing the appellate court's supervisory

power to stop the district courts from employing such a definition. The use of the supervisory power makes sense only if it is designed to prevent the possibility that prejudice may arise in a particular case.

With the possible exception of the definition of the elements of the offense, no matter included in the instructions to a jury in a criminal case is of more fundamental importance to a defendant than the manner in which the burden of proof is allocated. The very hallmark of the American system of criminal justice is the requirement of proof beyond a reasonable doubt. *In re Winship,* 397 U.S. 358, 364 (1970). Equating reasonable doubt with substantial doubt has the effect of lowering the government's burden of proof. In a case such as the instant one, where the trial court recognized that the identification of the disputed substance was not "completely clear from the testimony at trial," reducing the government's burden of proof has a substantial impact on the rights of a defendant.

In order to resolve the conflict between the opinion of the court below and the holding of the Court of Appeals for the Fifth Circuit over whether a defendant in criminal cases is prejudiced by an instruction which equates a reasonable doubt with substantial doubt, this Court should issue its writ.

III. The Decision Of The Court Below That Rule 16 Does Not Require The Pretrial Production Of Results Of Scientific Tests And Experiments That Are Not Recorded In Documentary Form Conflicts With The Holding Of The Court Of Appeals In The Ninth Circuit.

The only reason that the government was permitted to introduce testimony concerning polarimetry testing of the cocaine they obtained from a chemical company was the failure of the government's expert to record the results of his test in writing. The government sought to introduce testimony concerning a whole series of polarimetry testing of various substances. None of the testing or results was disclosed to petitioner prior to trial in compliance with Rule 16 of the Federal Rules of Criminal Procedure. If the government's expert had made some sort of report of the polarimetry test he performed on the substance obtained from the chemical company, the trial court would have excluded this testimony consistent with the exclusion of the testimony concerning all the other polarimetry test results which were recorded. The courts below concluded that there was no power to exclude the results of unrecorded testing because the disclosure requirements of Rule 16 did not apply to such testing.

This decision is in direct conflict with the decision of the Court of Appeals for the Ninth Circuit in *In re Serra,* 484 F.2d 947 (9th Cir. 1973). In *Serra,* the defendant in a criminal case was subjected to a series of psychiatric and psychological tests in preparation for an insanity defense. The defendant's attorneys sought to avoid the requirement of disclosing to the government the reports of the psychological testing by his expert witnesses by simply directing them not to write a report. Instead, they reported orally. The Court of Appeals for the Ninth Cir-

cuit was sufficiently satisfied that production of the results of scientific tests and experiments required the disclosure of unwritten as well as written results to uphold a decision that the defendant's attorney was in contempt.

The failure to disclose to a defendant the results of scientific tests and experiments prior to trial has been described as trial by ambush. *United States* v. *Kelly*, 420 F.2d 26 (2d Cir. 1969). In a time when discovery in criminal cases is becoming more open, the decision of the court below will serve as justification for returning to the era of trial by surprise by countenancing a means for avoiding disclosure of scientific testing. In order to avoid this possibility and in order to resolve the conflict between the circuits, this Court should issue its writ.

CONCLUSION

Because of these clear conflicts in the decisions of the Courts of Appeals, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
For the Seventh Circuit

Chicago, Illinois 60604
(Argued May 31, 1977)
June 27, 1977.

Before
Hon. Thomas E. Fairchild, Chief Judge
Hon. Philip W. Tone, Circuit Judge
Hon. Robert A. Grant, Senior District Judge*

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

No. 77-1064 vs.

DUANE OWEN HESTNES,

Defendant-Appellant.

Appeal from the United States District Court for the
Western District of Wisconsin
No. 76-CR-3
James E. Doyle, *Judge.*

ORDER

Defendant was convicted of distribution of cocaine, a Schedule II Controlled Substance. We find no merit in any of the numerous errors complained of. Only two deserve extended discussion.

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* The Honorable Robert A. Grant, Senior District Judge of the United States District Court for the Northern District of Indiana, is sitting by designation.

1. *Refusal To Allow Defendant To Call a Second Expert*

The only issue at the trial was whether the substances the defendant had distributed contained *l*-cocaine, which is the only one of the numerous isomers of cocaine that is derived from coca leaves and thus a controlled substance under the statute. Eventually the crucial question became whether the cocaine in the samples of the substances in question was *l*-cocaine rather than *d*-cocaine. It appears that one test which might have unequivocally answered this question was the polarimetry test. For some reason the government did not have this test performed until October 7 and October 14. The jury was selected on October 12, and testimony commenced on October 18. The trial court excluded testimony about these tests because the reports were not turned over to the defendant until October 15, and Rule 16, Fed. R. Crim. P., was therefore not complied with in the trial court's view. As a result of the exclusion of the polarimetry tests the government was reduced to proving that the substances contained *l*-cocaine by evidence from its expert that he had performed a mixed melting point test.

The government expert testified that he performed the test as follows: He extracted the cocaine from the suspected sample and from a laboratory standard substance known to contain *l*-cocaine and treated these extracts with gold chloride to obtain the gold chloride derivative of cocaine. Each derivative was then placed in a separately labelled melting point capillary tube. Then equal amounts of the two gold chloride derivatives were mixed together and the mixture was placed in a third capillary tube. All three were then heated in an oil bath and their melting points observed. The melting point of the third substance, the mixture, was observed to be the same as the melting point of the other two. If one of the others had been a

gold chloride derivative of *d*-cocaine, the government expert reasoned, the melting point of the mixture would have been different. He based this on the fact that the literature reports this variation in a mixture of *hydrochlorides* of *l* and *d*-cocaine, "and I believe that the gold chloride derivative would also act this way."

The defendant's counsel cross-examined the expert at great length about the test, and introduced detailed testimony of the defendant's own expert as to the defects of the test.

His attempt to offer testimony of an additional expert gives rise to the issue now before us. We must review the district court's exclusion of this testimony on the basis of the offer of proof made by defendant's counsel. The offer was to the effect that the witness, Jerome Guerts, a senior analytical chemist in the Wisconsin State Crime Laboratory, would testify that he

(a) had examined many suspected samples of cocaine to determine whether they were *l*- or *d*-cocaine;

(b) himself uses mixed infrared spectroscopy for that purpose;

(c) had read literature in support of that technique which is produced by DEA;

(d) had never heard of any laboratory in the world using a gold chloride derivative as a basis for mixed melting point determination of whether substance is *d* or *l*-cocaine; and

(e) does not use this test himself because "there are no values available to determine the characteristics of the melting point, the mixture as contrasted with the constituents."

For the reasons stated in the footnote,[1] we view the matter as if the witness had been present in the courtroom and consider whether, upon an examination of the whole record, the defendant was prejudiced by the exclusion of the testimony stated in defendant's offer of proof. We conclude that he was not, because of the limited probative value of the offered testimony and the fact that the relevant portions of the testimony were essentially cumulative.[2] In excluding the evidence, the judge did not abuse the discretion conferred by Rule 403, Fed. R. Evid.

In the above summary of the offer, Item (a) relates only to the witness' qualifications. Item (b), the test the witness himself uses, is of slight probative value. The same is true of Item (c), as it is stated, *i.e.*, that literature promulgated by DEA supports the test used by the witness. In any event, the DEA manual was identified at the trial and, like other scientific works shown to be authoritative, could have been read to the jury under Rule 803(18), Fed. R. Evid.

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[1] Defendant's counsel completed offering the evidence then available 17 minutes before 3:00 P.M., the time he said he had told the witness, who had been subpoenaed, to appear to testify. These 17 minutes need not have been wasted, because the court and counsel had yet to settle instructions, and the court therefore excused the jury until 3:00 P.M. The instruction conference could have proceeded while the court and counsel were awaiting the witness' arrival. The trial judge, however, refused to allow the witness to testify, stating that counsel for the defendant had not only wasted time in an inordinately long cross-examination earlier in the trial but had stated that he believed the trial could be completed that afternoon.

[2] The government so argued in its brief, but conceded in oral argument under somewhat aggressive questioning from the bench that it was not entirely cumulative. We have examined the record for ourselves.

Item (d), as stated, *i.e.*, that the witness had never heard of any laboratory in the world using a gold chloride derivative of cocaine as a basis for a mixed melting point determination of whether a substance contains *d* or *l*-cocaine, is not in the form in which expert testimony is generally presented. What a witness has never heard of, without testimony of what he has heard of or knows or has an opinion about, is of limited probative value.

The form in which the offer of proof was presented is more than a technicality. The offer was counsel's representation to the court of what he expected the testimony to show. Presumably, just as its contents indicate what counsel was willing to represent, its limitations indicate what he was not. The trial court was entitled to assume that these limitations were not unwitting.

In any event, however, the government's own witness admitted on cross-examination that the gold chloride derivative version of the test was not discussed in the various scientific works he knew of, that he was not aware of its being discussed in any such work, and that he had never read anywhere that the test is appropriate.

With respect to Item (e), the fact that the witness did not use the test himself was of little significance apart from his reason, *viz.*, the absence from the literature of a value for the melting point of a mixture of gold chlorides of *d* and *l*-cocaine. That point was repeatedly admitted by the government's expert during his lengthy cross-examination. Moreover, he conceded that he himself had stopped using the test because of the absence from the literature of such a value and the consequent difficulties which an expert encountered in court when testifying about the test. The defendant's expert Shapiro had testified extensively on this and other defects of the gold chloride derivative test.

Defendant nevertheless argues that the proffered testimony would not have been cumulative because Guerts was not subject to the same inferences of bias as defendant's first expert, Shapiro, and therefore would have been a more credible witness. Inasmuch as Shapiro testified that he served as a consultant for the Boulder County District Attorney, however, he enjoyed whatever prestige might accompany affiliation with law enforcement, and no general pro-defendant or anti-prosecution bias could be attributed to him. And, while the defendant's counsel now argues that Guerts, unlike Shapiro, was not to be paid for his appearance and thus would not have been a "hired gun," the record contains no indication that counsel made this argument to the trial court or advised that court of the fact on which this argument is based. Especially in light of this failure to apprise the court of any credibility distinction with respect to evidence that was at best cumulative, we cannot say that the court's rejection of the offer of proof, which limited the defendant to one expert to match the government's expert, was an abuse of discretion.

2. *Reasonable Doubt Instruction*

Defendant complains of the giving of the reasonable doubt instruction forbidden by *United States* v. *Wright*, 542 F.2d 975 (7th Cir. 1976). That case was decided only 15 days before the trial, and, as the record shows, the district judge had not yet read it and counsel did not call it to his attention. The rule of that case was adopted in the exercise of our supervisory powers, not as a ruling based on due process or inherent prejudice. We do not consider this case an appropriate subject for the application of that power.

In a post-trial order the district judge explained his continued use of the standard LaBuy instruction on reasonable doubt in the face of this court's decision in *United States* v. *Crouch*, 528 F.2d 625 (7th Cir.) *cert. denied*, 97

S.Ct. 267 (1976). We find the court's confusion as to the import of that case understandable. In *United States* v. *Shaffner*, 524 F.2d 1021, 1023 n.2 (7th 1975), *cert. denied*, 96 S.Ct. 1126 (1976), this court explicitly approved the three-paragraph instruction that was read to the jury verbatim in the case at bar. In *United States* v. *Gratton*, 525 F.2d 1161 (7th Cir. 1975), the defendant specifically attacked the equation of a reasonable doubt with a substantial doubt in that instruction; the court, however, simply held that giving the instruction was not plain error. In *United States* v. *Crouch, supra*, 528 F.2d at 631, the court addressed the same issue in a case where there had been a specific objection to the instruction before the district judge. Although it considered the language of "substantial doubt" objectionable in itself, the court found no error because the entire three-paragraph instruction, "considered as a whole," was not prejudicial. In a footnote, however, the court stated that if the district court in that case had been aware of *Gratton*, it would be necessary to exercise the court's supervisory power, apparently to reverse. Given the court's finding in *Crouch* that no prejudice attached to the instruction and the fact that *Gratton* itself had not addressed the propriety of the instruction apart from holding it not plain error, we can hardly fault the District Court here for emphasizing the approving statement in the text rather than the ambiguous warning in the footnote.

While *Wright* will be enforced in the future, we decline to reverse here, when the judge's failure to follow it was not deliberate and no prejudice to the defendant could have resulted.

3. *Other Contentions*

Defendant contends that the indictment is insufficient. We conclude that it adequately charges an offense, inas-

much as it identifies the cocaine which is the subject of the charge as a Schedule II Controlled Substance. Schedule II does not include forms of cocaine that are not derived from coca leaves.

Defendant also challenges the sufficiency of the evidence. In our view, there was sufficient evidence to permit the jury to determine beyond a reasonable doubt that the substances defendant distributed contained *l*-cocaine. The adequacy of the tests performed by the expert and the experts' contradictory opinions concerning the reliability of these tests were questions of fact for the jury, which was also entitled to consider defendant's representations as to what he was selling and the price he charged.

Defendant also complains that a polarimetry test made on the standard used in the mixed melting point test should have been excluded under Rule 16, Fed. R. Crim P., because of the government's failure to make timely disclosure of the results of that test. That rule did not apply in this instance for two reasons. As the trial court held, no results of the test having been recorded, it fell outside the terms of the rule, which applies only to "records." Moreover, it is doubtful that a test made, not for the purpose of the particular case, but upon a standard used in the laboratory for comparison-testing of numerous samples, was "intended for use by the government as evidence in chief at the trial." Rule 16(a)(1)(D).

We do not find error in the trial court's refusal to give the instructions tendered by counsel for the defendant on evaluating expert testimony and on the defendant's theory of defense. The jury was adequately instructed on both subjects. No particular form of words was necessary.

The judgment is affirmed.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

v.

MICHAEL P. REIGH,

Defendant.

76-CR-7

UNITED STATES OF AMERICA,

Plaintiff,

v.

DUANE OWEN HESTNES,

Defendant.

76-CR-3

MEMORANDUM

The jury trial in this court was held in July, 1976, in 76-CR-7 and in October, 1976 (ending October 25, 1976). in 76-CR-3.

On September 27, 1976, the Court of Appeals for this circuit decided *United States* v. *Wright* (No. IP-75-102-CR). The slip opinion reached my chambers on October 1, 1976 but was not read by me until October 30, 1976. Although a completely transcribed record in 76-CR-3 may reveal that *Wright* was called to my attention by counsel, my recollection is that it was not.

However, my recollection is that in both cases, defense counsel called to my attention in timely and pointed fashion counsel's belief that the manner in which I proposed

to handle, and did handle, the jury instructions did not conform to Rule 30 of the Federal Rules of Criminal Procedure.

Also, in 76-CR-3, in the course of pretrial proceedings before a United States Magistrate, in the course of pretrial proceedings before me (in which written reference to *United States* v. *Shaffner*, 524 F.2d 1021, 1023 (7th Cir.) was made), and in the course of discussion of the instructions at trial, counsel for the defendant timely and pointedly objected to LaBuy 6.01-3 which undertakes to define "reasonable doubt." I do not recall whether objection was made by either party to LaBuy 6.01-3 in 76-CR-7. In both 76-CR-7 and 76-CR-3, I gave LaBuy 6.01-3.

1. *Rule 30*

With respect to this matter, the purpose of this memorandum is to amplify the written record in both 76-CR-7 and 76-CR-3 by recording that in each case, my demeanor as well as my words were intended to convey to counsel with sharp emphasis that I would not permit counsel, after the jury was actually instructed and when the jurors were on the verge of beginning their deliberations, an opportunity to state objections to any portion of the charge or to any omission therefrom, which objections had already been stated and dealt with by the court in the course of a proceeding held out of the presence of the jury prior to the closing arguments.

Rather, my demeanor as well as my words were intended to convey to counsel with sharp emphasis that when I had finished reading my instructions to the jury, I would inquire whether counsel desired to be heard before the jury commenced its deliberations, and that at that juncture counsel might call to my attention any inadvertent discrepancy between the instructions as I had said I would give them and the instructions as I had actually given them, plus any new matter not previously discussed. Even as to the latter, my demeanor as well as my words were intended to convey that counsel would be expected to make a complete statement of their objections during the proceeding prior to closing argument. It would be quite inaccurate and unfair to say of defense counsel in these cases that they have "a low resistance to discouragement" (*Wright*, page 16); they were given every reason to believe that persistence in objection to the procedure would be unavailing.

There is much I yearn to say about how Rule 30 is to be construed, but I refrain.

2. *LaBuy 6.01-3*

Prior to *United States* v. *Gratton*, 525 F.2d 1161, 1162 (7th Cir. 1975), I understood the Court of Appeals to have stated rather clearly that LaBuy 6.01-3 is a permissible instruction. I read *Gratton* as confirming my understanding (". . . we approved LaBuy 6.01-3 . . . in dictum in [*Lawson*]"), as stating that in *Gratton* the court was called upon to decide only whether giving LaBuy 6.01-3 was plain error, and as deciding that it was not. I read the opinion in *United States* v. *Crouch*, 528 F.2d 625, 630-631 (7th Cir., January 16, 1976), to remind the reader: "Finally, in what is probably our most extensive discussion on the question, we gave our approval to [6.0.-3] in the case of *United States* v. *Shaffner*, 524 F.2d 1021 (7th Cir. 1975)." I read *Crouch* (page 631, footnote 2) to say, further, that 6.01-3 is "indeed suspect and definitely not preferred." But I did not read *Crouch* to say that it was error to give 6.01-3. Upon rereading *Crouch*, after reading

Wright, I can see that my earlier reading of *Crouch* may have been imperfect, failing to give full meaning to the words "objectionable nature" in the test (page 631) and to the last sentence in footnote 2. I do not recall that *Crouch* was called to my attention in either 76-CR-7 or 76-CR-3.

One might well inquire why a trial court would continue to employ an instruction which had obviously and repeatedly been called into question. My reply would be that, while it may appear rather unimaginative and docile, for more than eleven years I have thought it a practical approach in this circuit to use LaBuy unless a particular LaBuy instruction seemed to me clearly wrong, which LaBuy 6.01-3 did not and does not, or unless the Court of Appeals had clearly rejected it, which I had not recognized it to have done.

Entered this 5th day of November, 1976.

BY THE COURT:

/s/ *James E. Doyle*
District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

v.

DUANE OWEN HESTNES, Defendant.

76-CR-3

OPINION AND ORDER

There remains for decision defendant's motion for a new trial on two bases (using the numbering employed in the written motion):

> "1. The Court erred in permitting the government to introduce in its case in chief testimony concerning a polarimetry test run by the government on the alleged standard cocaine without disclosure of the results of said test to the defendant in advance of trial in violation of the provisions of Rule 16 of the Federal Rules of Criminal Procedure."
>
> "5. The Court erred in instructing the jury in the following respects:
>
> > "a. The Court's instruction on reasonable doubt improperly equated reasonable doubt with substantial doubt over the objection of the defendant."

Ground 1

The government's chemist explained the mass spectrometer test, the infrared spectrophotometer test, and the mixed melting point test, all of which were run in this case, and contended that they were effective means by

which to identify the disputed substance as l-cocaine. He testified that each of these tests requires a comparison with the results obtained from an identical test performed upon a "standard" substance known to be l-cocaine. It is difficult to imagine why it seemed to come to the witness like a bolt from the blue when he was called upon to show that the standard used for comparison in this case was indeed l-cocaine.

It emerged eventually from the testimony: that the standard used in this case came from a certain bottle containing a substance manufactured by a Mallinckrodt company and considered to be l-cocaine: that the substance in this particular Mallinckrodt bottle was used by this government witness and by other chemists in the laboratory as standard l-cocaine in testing various questioned substances from time to time; that it had happened to be this particular witness who had been the first to open this particular Mallinckrodt bottle after it had been received at the government laboratory, and he had performed a polarimetry test on its contents which demonstrated that it was indeed l-cocaine, but that he had made no written record of this testing procedure or the results; and that on several occasions in which he was using the substance from the same bottle for comparison with questioned substances in other cases (unrelated to this defendant's case), he had performed tests on the standard which demonstrated that it was indeed l-cocaine, but that the written records of these tests were scattered among the files in the particular cases in which the tests had been conducted. Because the government had failed to produce these latter written records in response to the defendant's pretrial discovery motion, I ruled that the government could make no use of them at trial, and none was made. However, over defendant's objection, I permitted the witness to testify from

memory about the one occasion on which he had conducted a polarimetry test on the sample, not in the course of making a comparison in a particular case, but had made no written record of the test or its results.

It is this latter ruling to which ground 1 for defendant's motion for a new trial is directed. I conclude that my power in this respect arises only from the explicit rule which has been promulgated, namely, Rule 16; and that it is clear that Rule 16 in general, and Rule 16(1)(D) in particular, reaches only to documents and things which are capable of being physically delivered or inspected or copied. Defendant contends that this construction of Rule 16 provides the government with the opportunity to run scientific tests and experiments, prepare no records of the procedures used or the results obtained, escape the need to reveal the information prior to trial, but present the information through testimony at trial. I consider this comment apt, but the language of Rule 16 is open to no other reasonable construction. Also, it would be too risky to the prosecution for government scientists as a matter of practice to refrain from making records of their tests: their memories would fail them at trial.

Ground 5

Over defendant's objection I gave the following instruction from LaBuy:

> "6.01-3 Reasonable Doubt
>
> "A reasonable doubt means a doubt that is based on reason and must be substantial rather than speculative. It must be sufficient to cause a reasonably prudent person to hesitate to act in the more important affairs of his life."

On November 5, 1976, I entered a memorandum in this case on this subject, and I have little to add to what was said there.

As the trial judge, I find it unusually difficult to discern my proper role in acting upon the defendant's motion for a new trial. Had I not given the first sentence of 6.01.3, of course the problem would not now exist. Also, I cannot say that it was completely clear from the testimony at trial that the disputed substance was l-cocaine. But the jury's verdict should stand unless there is good reason to overturn it, and the present law of the circuit appears to be that giving the instruction is not plain error. *United States* v. *Gratton,* 525 F.2d 1161, 1162 (1975). Thus, apparently I am called upon to decide how likely it is that the jury considered the government's chemist's testimony strong enough only because it had been instructed that a reasonable doubt must be substantial. My independent answer to this question is that even if the jury had not been told that a reasonable doubt must be substantial, it would have considered the government's testimony strong enough.

However, the supervisory powers of the appellate court seem to be implicated here in some manner and in some degree. See *United States* v. *Crouch,* 528 F.2d 625, 631, n. 2 (7th Cir. 1976); and *United States* v. *Wright,* No. 76-1007, 7th Cir., September 27, 1976, at page 21 of slip opinion. In *Wright* at page 21, it was said most pointedly: "We also observe, however, that the message to the district courts of this circuit having been stated in *Crouch* in January 1976, and having been repeated here, should now be clear and that a district court giving a reasonable doubt instruction containing the challenged equation notwithstanding a Rule 30 challenge can reasonably expect a reversal." As I stated in the memorandum entered November 5, 1976,

the "message" in *Crouch* had been received and read but apparently imperfectly comprehended by October 25, 1976, when I instructed the jury in the present case, while the repetition of the message in *Wright* had been received on October 1, 1976, but not yet read, and neither party brought *Crouch* or *Wright* to my attention.

Obviously, if only considerations of judicial deference and courtesy were at stake, I would hasten to grant this motion, expressing my regret, genuine as it is, that I had not read *Wright* more promptly, and resolving all doubts in favor of acquiescence by the trial court in the authoritative viewpoint of the appellate court. But much more is at stake when, after a vigorously fought trial, a jury has found a defendant guilty of three crimes.

I conclude that I must follow the course which appears to me most just, and not attempt to anticipate the manner in which the appellate court may decide to exercise its supervisory powers.

Order

It is hereby ordered that defendant's motion for a new trial is denied.

Eentered this 11th day of January, 1977.

BY THE COURT:

/s/ James E. Doyle
District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF ILLINOIS

UNITED STATES OF AMERICA,

Plaintiff,

v.

DUANE OWEN HESTNES,

Defendant.

Trial Court Transcript, Volume 7, pp. 2-4

• • •

MR. SHELLOW [Defense Counsel]: In connection with the person I'm not going to be able to call, I'd like the record to reflect that at 17 minutes of three that the witness is Mr. Jerome Guerts; that he is a senior analytical chemist in the Wisconsin State Crime Laboratory; that in that capacity he has examined on many occasions substances which were submitted to the laboratory as suspected samples of cocaine; that he has examined such samples of cocaine; that he has examined such samples to determine whether or not they are d-cocaine or l-cocaine; that the technique which he uses to determine whether samples are d-cocaine or l-cocaine is a technique called mixed infrared spectroscopy; that he has read the literature in support of this technique and that literature is produced by the Drug Enforcement Administration and was released in May of 1976.

Further, he would testify that he has never heard of any laboratory in the world using the technique of the gold chloride derivative of cocaine as the basis for a mixed melting point determination of whether a substance is d- or l-cocaine. I say the reason he doesn't use that substance is that there are no values available to determine the characterists of the melting point, the mixture, as contrasted with the constituents. That's to what he would testify, Your Honor.

THE COURT: Well, Mr. Shellow, there's a very strong implication in your remarks that there's some sort of injustice going on here about your inability to call another witness. Either it was interminable cross-examination which was not to the point and not of great importance last week and it was very clear that we intended to make every effort to conclude this trial today and earlier in the day you've indicated that you felt that that was a practical thing and now you indicate to me that you intend to call a witness who is to report at three o'clock and to go into the matters that you've discussed.

It would be impossible to submit the case if such a witness is called. Mr. Wood, do you wish to be heard?

MR. WOOD [Assistant United States Attorney]: No, sir.

THE COURT: I will adhere to my ruling.

Supreme Court, U. S.
FILED
DEC 8 1977
MICHAEL RODAK, JR., CLERK

No. 77-296

In the Supreme Court of the United States

OCTOBER TERM, 1977

DUANE OWEN HESTNES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,

BENJAMIN R. CIVILETTI,
Assistant Attorney General,

JOSEPH S. DAVIES, JR.,
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DUANE OWEN HESTNES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The order of the court of appeals (Pet. App. 1a-8a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on June 27, 1977. A motion for reconsideration was denied on July 22, 1977. The petition for a writ of certiorari was filed on August 22, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the district court abused its discretion under Rule 403, Fed. R. Evid., in refusing to allow petitioner to introduce the cumulative testimony of a second expert witness.

2. Whether the district court's instruction on reasonable doubt constituted reversible error.

3. Whether the district court erred in holding that Rule 16(a)(1)(D), Fed. R. Crim. P., did not require the government to provide petitioner with unwritten results of a scientific test not performed in connection with petitioner's trial.

STATEMENT

Following a jury trial in the United States District Court for the Western District of Wisconsin, petitioner was convicted on three counts of distributing cocaine, in violation of 21 U.S.C. 841. Petitioner was sentenced to concurrent terms of five years' imprisonment, followed by concurrent special parole terms of three years. The court of appeals affirmed (Pet. App. 1a-8a).

The evidence at trial established that a special agent of the Drug Enforcement Administration ("DEA") met petitioner through an informant in Stoughton, Wisconsin, on December 1, 1975 (I Tr. 28-29). After discussing the possibility of effecting a cocaine transaction, the agent and petitioner arranged a meeting on December 16, 1975, at which petitioner gave the agent 28.15 grams of cocaine in exchange for $1,400 (*id.* at 114-118). A similar meeting took place on December 18, 1975, at which petitioner gave the agent 28.05 grams of cocaine in exchange for $1,400 (*id.* at 139-141, 146-148). At a third meeting, on January 13, 1976, petitioner exchanged 56.37 grams of cocaine for $3,100 (*id.* at 161-166). Petitioner was arrested on February 18, 1976 (II Tr. 249).

ARGUMENT

1. Petitioner contends (Pet. 9-12) that the district court abused its discretion under Rule 403, Fed. R. Evid., in refusing to allow petitioner to call a second expert witness

at trial. After examining the record, the court of appeals correctly concluded that the proffered testimony was of "limited probative value" and "essentially cumulative," and therefore that the district court did not err in its evidentiary ruling (Pet. App. 2a-6a). That determination does not warrant review by this Court.[1]

The only disputed issue at trial involved the identity of the substances that petitioner had sold to the DEA agent. The government sought to prove that the white powder received by the agent contained "*l* "-cocaine, a controlled substance under 21 U.S.C. 841. Petitioner, on the other hand, attempted to persuade the jury that the government's evidence was insufficient to establish beyond a reasonable doubt that the powder contained "*l* "-cocaine rather than one of the numerous other

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[1]In August 1977, petitioner was tried on a different charge before the same district judge in the Western District of Wisconsin. On October 25, 1977, petitioner filed with this Court a motion to vacate the judgment of the court of appeals in this case and to remand for reconsideration in light of certain comments allegedly made by the district judge in the second trial. The alleged comments, reproduced at page 5 of petitioner's motion, reveal simply that in excluding the second expert witness at petitioner's October 1976 trial, the district judge was motivated by the need to keep the length of the trial "within reasonable limits." In deciding whether to permit "essentially cumulative" testimony, the district judge was influenced by his view that

> frequently during the trial, [defense counsel] had engaged in cross-examinations for unreasonably long periods of time. Those repeated occasions could be fairly characterized as the pursuit of points in interrogation at lengths utterly inappropriate to their intrinsic importance in the trial, at lengths far beyond those reasonably appropriate to efforts to diminish the witness's credibility.

Under Rule 403, Fed. R. Evid., such considerations are perfectly appropriate in a district court's decision on the admission of evidence. Petitioner's motion should be denied.

isomeric forms of that drug not derived or prepared from coca leaves and hence not qualifying as controlled substances under Section 841. The government's expert testified he had performed a mixed melting point test using gold chloride derivatives in order to identify the unknown substances as "*l* "-cocaine (III Tr. 4-79); IV Tr. 164-188). Petitioner's counsel cross-examined the expert at great length about this test (IV Tr. 190-230, 286-347; V Tr. 370-496). He then introduced detailed testimony by petitioner's own expert concerning defects in the test (VI Tr. 661-730). After petitioner's expert witness had testified, defense counsel requested the court to wait just over a quarter of an hour for the expected arrival of a second defense expert witness. Counsel represented that the witness was a qualified chemist whose testimony would cast further doubt on the reliability of the test performed by the government's expert witness. The district court refused to allow petitioner to call this expert (*id.* at 763, 765-767).

Rule 403, Fed. R. Evid., allows the exclusion of relevant evidence "if its probative value is substantially outweighed by * * * considerations of undue delay, waste of time, or needless presentation of cumulative evidence." A district court has considerable latitude in its determination to admit and exclude evidence, and this is particularly true in the case of expert testimony. *Hamling* v. *United States*, 418 U.S. 87, 108. Here, any flaws that may have marred the test conducted by the government's expert were stressed by defense counsel on lengthy cross-examination and during the extensive presentation of his own expert. The offer of proof regarding the second defense expert revealed that that witness would merely reiterate earlier testimony concerning alleged inadequacies

in the government's test. Given the volume of testimony already introduced on the subject, the court's exclusion of the witness was not error.[2]

2. Petitioner next contends (Pet. 12-14) that the district court improperly instructed the jury on the meaning of reasonable doubt. The court first charged that the prosecution had the burden of proving the defendant guilty beyond a reasonable doubt and that if the government failed to carry that burden, the jury was obliged to render a verdict of acquittal. The court then stated (VII Tr. 96-97):

> A reasonable doubt means a doubt that is based on reason and must be substantial rather than speculative. It must be sufficient to cause a reasonably prudent person to hesitate to act in the more important affairs of his or her life.

This instruction was drawn verbatim from LaBuy, *Manual on Jury Instructions in Federal Criminal Cases*, Part I, § 6.01-3, 33 F.R.D. 523, 567 (1963).

The Seventh Circuit has expressed disapproval of the equation of "reasonable doubt" with "substantial doubt" and, in an exercise of its supervisory power, has indicated that a district court giving such an instruction over objection "can reasonably expect a reversal." *United States* v. *Wright*, 542 F. 2d 975, 988 (C.A. 7). *Wright* was decided on September 27, 1976; the jury instructions in this case were given on October 25, 1976. In a

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[2]Petitioner's reliance on *Washington* v. *Texas*, 388 U.S. 14; *Chambers* v. *Mississippi*, 410 U.S. 284; *Braswell* v. *Wainwright*, 463 F. 2d 1148 (C.A. 5), and *United States* v. *White*, 324 F. 2d 814 (C.A. 2), is misplaced. Each of those cases involved the exclusion of one or more material witnesses whose testimony was crucial to the defense theory of the case.

memorandum filed several days after the jury had reached its verdict (Pet. App. 9a-12a), the district judge explained that he had not read the *Wright* slip opinion until October 30, 1976, and consequently had been unaware of the appellate court's rejection of the challenged language at the time the charge was given.[3] On petitioner's motion for a new trial, the district judge expressed regret at not having read *Wright* more promptly but concluded that the verdict returned after a vigorously fought five-day trial should not be disturbed in anticipation of the manner in which the appellate court might decide to exercise its supervisory power (Pet. App. 15a-17a).

The court of appeals found that the district court's failure to follow *Wright* was not deliberate and that no prejudice to petitioner could have resulted therefrom (Pet. App. 7a). The court stressed that its holding in *Wright* was based not on considerations of due process or inherent prejudice, but rather on the appellate court's supervisory power. Under the circumstances, the Seventh Circuit did not believe that this case presented an appropriate occasion for its exercise of that power. Since the resolution of this case depended heavily on its special facts, and since future reasonable doubt instructions given by district courts in the Seventh Circuit will not contain the objectionable paragraph, further review by this Court is not warranted.

Petitioner asserts (Pet. 12-14) that the court of appeals' ruling in this case conflicts with the law in the Fifth Circuit, as reflected in *United States* v. *Alvero*, 470 F. 2d 981 (C.A. 5). Petitioner is incorrect for two reasons: (i)

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[3]Although defense counsel did object to the reasonable doubt instruction, neither he nor the prosecutor called the *Wright* decision to the court's attention.

Alvero involved a distinguishable factual situation; and (ii) a later Fifth Circuit decision demonstrates that the approach of that court of appeals is similar to the one adopted by the Seventh Circuit. In *Alvero*, the reasonable doubt instruction included the following passage (470 F. 2d at 982-983):

> It is not a speculative doubt, but any substantial reasonable doubt, common, ordinary horsesense doubt. It is one that remains after all the evidence is in that would cause a reasonable person to entertain a reasonable and proper doubt; a very substantial doubt, let me put it that way, of the guilt of the defendant. Then, of course, you must find him not guilty.

Both sides objected to the use of the phrase "*very* substantial doubt" (emphasis added). The trial judge gave further instructions intended to cure the error, but did not retract the offending language. Unpersuaded that the corrective efforts had had their desired effect, the court of appeals reversed. *Alvero* is thus significantly different from the present case, with respect to both the reasonable doubt charge actually given and the aftermath of that charge in the district court.

Moreover, in *United States* v. *Muckenstrum*, 515 F. 2d 568 (C.A. 5), the Fifth Circuit has recently reviewed a reasonable doubt instruction resembling the one here under attack. In that case, the district court told the jury (515 F. 2d at 570-571):

> Now, a reasonable doubt, as used in these instructions, means a doubt that is based on reason and common sense. Such doubt must be substantial rather than speculative, that is, a defendant is never to be convicted on mere suspicion or conjecture. Such doubt, however, must be a doubt that is reasonable and one which arises from the evidence or lack of it.

> It does not mean a mere possible doubt or a speculative, imaginary or forced doubt, because everything relating to human affairs is open to some possible or imaginary doubt.

The court of appeals held that, in the context of the whole charge, the challenged portion did not equate reasonable doubt with substantial doubt. The court added that

> the sentence instructing that a doubt must be substantial rather than speculative is confusing in that arguably it raises the burden from "reasonable doubt" to "substantial doubt" and would better be left unsaid.

Taken together, *Alvero* and *Muckenstrum* display no inconsistency with the position of the Seventh Circuit in *Wright* and the present case.[4]

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[4]In *United States* v. *Fallen*, 498 F. 2d 172 (C.A. 8), the Eighth Circuit sustained a criminal conviction despite the fact that, over objection, the district court had included the following sentence in its charge to the jury (498 F. 2d at 177):

> [A] reasonable doubt means a substantial doubt and not the mere possibility of innocence.

The court of appeals noted that the district court had also described reasonable doubt as "the kind of doubt that would make a reasonable person hesitate to act." Reviewing the instruction as a whole, the court concluded that the district judge had "conveyed the proper concept of reasonable doubt" (*ibid.*). The court stressed that its ruling did not diminish the vitality of *United States* v. *Atkins*, 487 F. 2d 257 (C.A. 8), decided several days after the *Fallen* trial. In *Atkins*, the district court used the same sentence which had prompted objection in *Fallen*. No objection was raised, however. The court of appeals declared that it did not approve of the statement that "reasonable doubt means a substantial doubt," but it refused to characterize the district court's charge as plain error requiring reversal even in the absence of contemporaneous objection. The outcomes in *Fallen* and *Atkins* are similar to, and certainly not in conflict with, the results reached by the Seventh Circuit in *Wright* and this case.

3. Petitioner contends (Pet. 15-16) that the district court erred in permitting the introduction of testimony concerning a scientific test performed on a government laboratory sample in November 1975, more than two months before petitioner's arrest. Under Rule 16(a)(1)(D), Fed. R. Crim. P., the government must produce upon request

> any results or reports * * * of scientific tests or experiments, * * * which are within the possession, custody, or control of the government, * * * and which are material to the preparation of the defense or are intended for use by the government as evidence in chief at the trial.

In March 1976, defense counsel filed a Demand for Discovery under this rule. In June 1976, the district court entered an order directing the government to comply with petitioner's discovery request (I Tr. 222-223; III Tr. 91-92). Due to a failure of communication between the prosecutor and the DEA laboratory in Chicago, polarimetry tests on the substances distributed by petitioner were not performed until October 1976, shortly before the beginning of trial (I Tr. 187-188). When the government attempted through its expert witness to introduce the results of these tests in order to prove that the substances in question were "*l* "-cocaine, the district court excluded the proffered testimony on the ground that the government had failed to make timely disclosure to defendant before trial (I Tr. 239). The government then attempted to introduce the results of a mixed melting point test, performed by the same expert in January 1976 and properly reported to defendant. This test involved a comparison of the substances obtained from petitioner with a quantity of known cocaine extracted from a laboratory standard sample.

To increase the probative value of the test results, the government sought to introduce scientific evidence showing that the laborato:y standard material was in fact "/"-cocaine. Over an eleven-month period, the government's expert witness had repeatedly tested the standard substance in the course of making comparisons with numerous unknowns submitted for his analysis. These tests had uniformly demonstrated that the standard was "/ "-cocaine. Ordinarily, the expert recorded the results of his testing in written form. Because the government failed to provide defendant with reports of these earlier tests conducted in connection with entirely unrelated cases, the district court refused to allow the government's expert to testify concerning his series of tests on the laboratory standard. The court made one exception, however. In November 1975, when the government's expert first opened the jar of standard cocaine obtained from a chemical supply company, he performed a polarimetry test on the contents shortly after breaking the manufacturer's seal. This test revealed that the substance in the jar was "/ "-cocaine. The chemist made no written record of this test, because no comparison with an unknown was involved and therefore no report needed to be prepared for litigation purposes. Since the results of this test were never reduced to writing, the district court ruled that the government was under no obligation to disclose those results pursuant to petitioner's discovery demand. Accordingly, the court permitted the government's expert witness to testify regarding the test on the laboratory standard performed in November 1975 (III Tr. 41-43, 46-52, 84-102; IV Tr. 114-121, 131-148, 164-170).

In denying petitioner's motion for a new trial, the district court stated that Rule 16(a)(1)(D) "reaches only to documents and things which are capable of being

physically delivered or inspected or copied" (Pet. App. 15a). The court of appeals agreed and affirmed (Pet. App. 8a).

The district court's interpretation of Rule 16(a)(1)(D) is correct. The language of the rule plainly contemplates discovery of tangible reports. The rule directs the government to permit defendants "to inspect and copy or photograph any results or reports" of relevant scientific tests or experiments within the government's control. The references to inspection and reproduction assume the existence of palpable data. Here, where the results of the November 1975 test were not reduced to writing and where the failure to prepare a written report was attributable to ordinary operating procedure, not to any scheme designed to avoid discovery,[5] the government was not required, under the district court's June 1976 order, to notify petitioner that a DEA chemist had determined that the laboratory standard was "/ "-cocaine. Since the outcome of the November 1975 test was not improperly withheld from defendant before trial, the district court did not err in allowing the government's expert witness to testify about that test.

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[5] *In re Serra*, 484 F. 2d 947 (C.A. 9), cited by petitioner, is inapposite. *Serra* involved the affirmance of a contempt adjudication against an attorney for deliberately attempting to frustrate the district court's discovery order by instructing a doctor hired to make a psychiatric examination of the defendant not to prepare a written medical report. In the present case, there is no suggestion of governmental impropriety. Indeed, the disputed test was performed more than a month before petitioner's cocaine sales and more than two months before petitioner's arrest.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1977.

Supreme Court, U. S.
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OCT 25 1977
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-296

DUANE OWEN HESTNES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

MOTION TO VACATE JUDGMENT AND REMAND TO LOWER COURT AND SUPPORTING BRIEF

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Respondent.

MOTION TO VACATE JUDGMENT AND REMAND TO LOWER COURT

COMES NOW the petitioner, DUANE OWEN HESTNES, by his attorney, JAMES M. SHELLOW, and, upon the Petition for a Writ of Certiorari previously filed and upon the affidavit of counsel annexed hereto, respectfully moves this Court for the entry of an order vacating the judgment of the United States Court of Appeals for the Seventh Circuit and remanding the matter to the court below for reconsideration in light of the document marked as Exhibit A to counsel's affidavit.

The facts upon which this motion is based are set out more fully in the Petition for a Writ of Certiorari previously filed and in the affidavit of counsel below. In particular, one of the issues upon which the petitioner

is seeking review in the United States Supreme Court relates to the refusal of the trial court to permit the petitioner to offer the testimony of a second expert witness. In affirming the conviction, the United States Court of Appeals for the Seventh Circuit held that the exclusion of the testimony was an appropriate exercise of discretion under Rule 403 of the Federal Rules of Evidence to exclude cumulative testimony. In his Petition, petitioner seeks review of this holding as a conflict with other decisions of this Court and other Courts of Appeals dealing with the right of a defendant to offer the testimony of witnesses in support of his theory of defense.

Following the conviction sought to be reviewed herein, the petitioner was tried on another charge in the same court, before the same trial judge represented by the same trial counsel. In the second case, the trial judge, *sua sponte,* issued a memorandum which indicates that his refusal to permit the testimony of the second expert witness in the first trial was a sanction for the cross-examination of other witnesses that the court considered to be too lengthy. The opinion of the Court of Appeals does not address the issue of the exclusion of the testimony of one witness as a sanction for cross-examination of other witnesses. Accordingly, petitioner is moving this Court for an order vacating the judgment of the Court of Appeals and remanding the case for consideration of this issue.

Respectfully submitted,

DUANE OWEN HESTNES,
Petitioner
By SHELLOW & SHELLOW

James M. Shellow

STATE OF WISCONSIN)
) ss.
MILWAUKEE COUNTY)

JAMES M. SHELLOW, being first duly sworn, on oath hereby deposes and says that:

1. He is an attorney licensed to practice law in the State of Wisconsin and has been admitted to practice in the United States Supreme Court.

2. He represented the petitioner, Duane Owen Hestnes, as trial counsel in the case entitled *United States of America v. Duane Owen Hestnes,* Case No. 76-CR-3, tried in the United States District Court for the Western District of Wisconsin, the Honorable James E. Doyle, District Judge, presiding. The Petition for a Writ of Certiorari previously filed by the petitioner seeks review of the judgment of the United States Court of Appeals for the Seventh Circuit affirming the conviction in this case.

3. One of the issues upon which a review is sought by petitioner relates to the refusal of the trial court to permit him to present the testimony of a second expert witness. The United States Court of Appeals held that the refusal to permit this testimony was an appropriate exercise of discretion under Rule 403 of the Federal Rules of Evidence to exclude cumulative testimony.

4. Your affiant also represented the petitioner, Duane Owen Hestnes, as trial counsel in a subsequent case entitled *United States of America v. Duane Owen Hestnes,* Case No. 77-CR-23, in the United States District Court for the Western District of Wisconsin, the Honorable James E. Doyle, District Judge, presiding. The trial in the second case commenced on August 24, 1977. On Au-

gust 25, 1977, the trial judge, *sua sponte,* issued a document, a copy of which is annexed hereto marked as Exhibit A, and which was identified in Case No. 77-CR-23 as Court Exhibit #5.

5. The transcripts of the trial in Case No. 77-CR-23 are being prepared by the court reporter but are not yet available. However, the trial judge made it clear on the record in Case No. 77-CR-23, that the earlier trial referred to in Exhibit A was the trial in petitioner's earlier case, Case No. 76-CR-3.

6. Exhibit A indicates that the trial judge refused to permit the petitioner to offer the testimony of the second expert witness in Case No. 76-CR-3 as a sanction for cross-examination of other witnesses that the trial judge considered to be too lengthy.

7. The trial judge gave petitioner no advance warning in Case No. 76-CR-3 that it considered a limitation on the number of defense witnesses as an appropriate sanction for cross-examination of other witnesses which the court deemed to be unreasonably lengthy.

James M. Shellow

Subscribed and sworn to before me

this ..... day of October, 1977.

.....
Notary Public, Milwaukee County, Wis.
My Commission .....

EXHIBIT A

United States v. Hestnes, 77-CR-23 8/25/77

In the course of an earlier trial in which Mr. Shellow appeared for a defendant, a circumstance arose near the conclusion of the trial in which I prevented the defendant from calling an additional witness. I consider this an unfortunate event. It occurred because of what I considered at the time a necessity to keep the length of that earlier trial within reasonable limits. In taking that action, I was influenced by my view that frequently during the trial, Mr. Shellow had engaged in cross-examinations for unreasonably long periods of time. Those repeated occasions could be fairly characterized as the pursuit of points in interrogation at lengths utterly inappropriate to their intrinsic importance in the trial, at lengths far beyond those reasonably appropriate to efforts to diminish the witness's credibility.

In the present trial I consider that Mr. Shellow is displaying a similar tendency. In the present trial, I hereby give the defense prompt notice that if this becomes a pattern of behavior, I may elect to deal with it in two ways: The first is to intervene from time to time, frequently if necessary, to limit cross-examination on particular points. The second is to limit direct examination of defense witnesses and, if necessary to limit the number of defense witnesses, in order to compensate for the excessive duration of cross-examination during the government's case.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-296

DUANE OWEN HESTNES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

BRIEF IN SUPPORT OF MOTION TO VACATE JUDGMENT OR REMAND

As described more fully in the Petition for a Writ of Certiorari, the primary issue at the trial was the adequacy of the government's proof of the identity of the substances allegedly delivered by the petitioner. One of the grounds upon which the petitioner is seeking review of the judgment of the Court of Appeals in this Court relates to the refusal of the trial court to permit the petitioner to present the testimony of a second expert witness. The government's chemist and an expert witness called by the petitioner offered conflicting opinions as to the suitability of one of the tests performed by the government's chemist for distinguishing the substances delivered from non-controlled substances. The trial court refused to permit the petitioner to offer the testimony of a second expert

witness in support of the petitioner's position that the test performed by the government's chemist was not an appropriate test. In its opinion affirming the conviction, the Court of Appeals held that the refusal of the trial court to permit the testimony of the second expert witness was an appropriate exercise of discretion under Rule 403 of the Federal Rules of Evidence to exclude cumulative testimony.

After the Court of Appeals affirmed the conviction and denied petitioner's motion for reconsideration, the petitioner was tried in a second case before the same trial judge represented by the same trial attorney. On the second day of this second trial, the trial judge, *sua sponte,* issued a document making reference to the exclusion of the testimony of the second expert witness in the first trial. That document, marked as Court Exhibit #5 in the second trial and reprinted herein as Exhibit A to counsel's affidavit, explains that the exclusion of the testimony of the second expert witness was imposed as a sanction for what the court considered to be frequent "cross-examinations for unreasonably long periods of time."

The document issued by the trial judge in the second trial significantly alters the posture of the case presently before this Court for review. Implicit in the Court of Appeals' decision that the trial judge properly exercised discretion given him by Rule 403 of the Federal Rules of Evidence to exclude cumulative testimony is the assumption that the trial judge in fact exercised discretion under that Rule. When a trial court makes a discretionary decision, appellate review is limited to a determination of whether the discretion was abused. Appellate review is not so limited, however, when it appears that the trial

court did not exercise discretion at all. *Cf. Yates v. United States,* 356 U.S. 363 (1958).

The opinion of the Court of Appeals presents the following issue: whether, in light of a criminal defendant's Sixth Amendment right to offer testimony in support of his theory of defense, it is an abuse of a trial court's discretion under Rule 403 to exclude the testimony of a second defense expert witness on a critical issue upon which the government and the defendant have each offered conflicting opinions of a single expert. Now that the trial court has issued an explanation for its decision to exclude the testimony of the petitioner's second expert, the case presents a different set of issues. The first issue is whether a trial court has authority under any circumstances to exclude the testimony of a witness called by the defense as a sanction for cross-examination of prosecution witnesses which the trial court concludes was too lengthy. It is difficult, if not impossible, to read such an authority into Rule 403. Petitioner has been unable to find any reported decision which discusses, let alone approves, such a sanction. The second issue presented, assuming such a sanction is available, is whether, under the particular circumstances of this case, the sanction was appropriately exercised.

The Court of Appeals, acting without the benefit of the trial court's recent explanation for its decision to exclude the expert testimony, does not address these issues in its opinion. In light of the trial court's explanation, it no longer seems appropriate for this Court to review the issue of the exclusion of the expert testimony in terms of the authority provided by Rule 403 to exclude cumulative testimony. Nor does it seem appropriate to ask this

Court to consider the issue of the exclusion of defense testimony as a sanction for cross-examination deemed by the trial judge to be too lengthy absent consideration by the Court of Appeals. What does seem appropriate is to remand the case back to the Court of Appeals for reconsideration in light of the trial court's recent explanation for its action. For this reason, petitioner respectfully presents to this Court his motion to vacate the judgment in this case and remand the matter back to the Court of Appeals for reconsideration of the issue of the exclusion of the expert testimony.

Respectfully submitted,

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